IN THE SUPREME COURT OF THE UNITED STATES

No. 71-1647

FEDERAL MARITIME COMMISSION v. SEATRAIN LINES, INC., ET AL.

BRIEF FOR RESPONDENT SEATRAIN LINES, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, *Petitioner*

v.

SEATRAIN LINES, INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT SEATRAIN LINES, INC.

Respondent Seatrain Lines, Inc. accepts the recitation in Petitioner's brief as to the opinions below and the jurisdiction of this Court to hear the instant matter.

ISSUES PRESENTED

I. Whether the United States Court of Appeals for the District of Columbia Circuit was correct in holding that the Federal Maritime Commission was without jurisdiction under Section 15 of the Shipping Act, 1916,

to approve an agreement providing for the acquisition of assets of one common carrier by water by another.

II. Whether the Federal Maritime Commission erred in denying Seatrain standing to protest and in failing to hold a hearing prior to ordering approval of an agreement for the sale of all the assets of one common carrier by water to another such carrier.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, 39 Stat. 728, 733 (1916), as amended, 46 U.S.C. § 814, is set forth in the addendum to this brief.

STATEMENT

On October 6, 1970, Pacific Far East Lines (PFEL) and the Oceanic Steamship Company (Oceanic), a subsidiary of Matson Navigation Company, common carriers by water in the foreign commerce of the United States, submitted to the Federal Maritime Commission (FMC or Commission) an agreement providing, *inter alia,* for the sale of four Oceanic ships and for the assignment to PFEL of Oceanic's rights in contracts for two vessels under construction with federal construction differential subsidy. In its transmittal letter of October 6, 1970, PFEL noted that "PFEL and Oceanic have been advised by their respective counsel that the contract of sale does not require approval of the Federal Maritime Commission under the provisions of Section 15 of the Shipping Act, 1916, or any other statute administered by your Commission." (Appendix, hereinafter, App., 33) This agreement of sale, later designated Agreement No. 9903, transferred to PFEL all of Oceanic's assets including all personnel and shoreside equipment and

facilities owned by Oceanic related to the vessels. As a result of this transfer, Oceanic retained its corporate existence and was not barred from competing against PFEL or from entering any other trade.

On October 14, 1970, Agreement No. 9903 was noticed in the Federal Register.[1] Seven days later, and within the FMC's allotted 10-day period for response, Seatrain Lines, Inc. (Seatrain) filed a timely protest, request for hearing, and petition to intervene. (App. 35). Seatrain is a common carrier by water. At the time Agreement No. 9903 was offered for approval, Seatrain operated cargo vessels between the United States Pacific Coast and the islands of Hawaii and Guam. Seatrain served Guam in competition with PFEL.[2] PFEL filed its reply on October 23, 1970 (App. 38). Less than two weeks after the Notice in the Federal Register, the Commission denied a hearing and approved Agreement No. 9903 by order dated October 27, 1970 (Appendix to the Petition for Writ of Certiorari, hereinafter P.A., 51), stating that no substantial issues had been raised and that Seatrain lacked standing to protest. On November 6, 1970, Seatrain petitioned for reopening to obtain reconsideration of the approval arguing, *inter alia,* that the proponents of the Agreement failed to meet their burden of proof, and that Seatrain had standing to protest as a participant in the domestic/Pacific trades in competition with PFEL to Guam and as a prospective competitor in the foreign trades. Seatrain pointed out to the Commis-

[1] 35 Federal Register 16114 (1970).

[2] At the time Agreement No. 9903 was offered for approval, Seatrain was seriously considering entering the Pacific trades to the Far East or Australia, areas served by Oceanic prior to the sale. App. 35, 36. Although not reflected in the record, Seatrain now serves the Far East.

sion serious questions directed to the application of the antitrust laws to Agreement 9903 (App. 41, 47, 48). The Commission denied Seatrain's Petition to Reopen on December 8, 1970, contending that:

> The ship sale is not, as Seatrain contends, "on its face a transaction that would violate Section 7 of the Clayton Act" . . . . Here, however, the nature of the Agreement as indicated by its language does not indicate a need for further justification. (P.A. 56)

The Commission once more stated its position that Seatrain lacked standing to protest the Agreement (P.A. 57).

On February 8, 1971, Seatrain sought review of the Commission's Order approving the Agreement in the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. § 2342(3). Seatrain's petition was founded upon the premise that the Commission erred in refusing Seatrain standing and by failing to hold a hearing prior to approving Agreement No. 9903. This occurred despite Seatrain's timely protest which pointed out the anticompetitive dangers inherent in the merger of these two American-flag common carriers by water in the foreign commerce of the United States. Seatrain's brief to the Court of Appeals pointed out that the Commission's jurisdiction over mergers of the nature encompassed by Agreement 9903 was in question, although Seatrain did not take a position on FMC jurisdictional authority at that time. The Department of Justice, however, representing the United States of America as statutory respondent under 28 U.S.C. § 2344, raised the question of the Commission's Section 15 authority over mergers. Agreeing with the Department of Justice that the Commission lacked authority under Section 15 to approve Agree-

ment 9903, the Court of Appeals held that "[i]t is not the Federal Maritime Commission which has the duty to approve or disapprove the type contract made the subject of this litigation." (P.A. 49) The Court below noted that

> No hearing was held, even though Section 15 itself recognizes that a hearing is appropriate in all cases other than those "of a purely routine nature"; which "have an impact on commerce that the Commission finds is *de minimis*" and those of "a restrictive nature" where the "applicant for approval . . . [satisfies] the burden of demonstrating the need for anticompetitive restraints. . . ." The sale of all Oceanic's assets to Pacific Far East, however, can hardly be said without a hearing to have a *de minimis* impact on competition. (P.A. 48-49) [Footnotes omitted] [Brackets original]

Due to its holding, the Court of Appeals deemed it unnecessary to consider the other issues presented by Seatrain's appeal. (P.A. 49-50)

SUMMARY OF ARGUMENT

Section 15 of the Shipping Act, 1916, requires that every common carrier by water file with the Commission for approval, *inter alia,*

> every agreement with another such carrier or person subject to this act [*inter alia*], . . . controlling, regulating, preventing, or destroying competition . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement or any modification or cancellation

> thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers . . . or to operate to the detriment of the Commerce of the United States, or to be contrary to the public interest, or to be in violation of this act, and shall approve all other agreements, modifications, or cancellations.
>
> The Commission shall disapprove any such agreement, after notice and hearing, for the finding of inadequate policing of the obligations under it. . . .
>
> Any agreement and any modification or cancellation of any agreement not approved or disapproved by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission. . . . [46 U.S.C. § 814]

These pertinent parts of Section 15, the legislative history of the Shipping Act, 1916, and the case law on principles of statutory construction show two things: first, that the acquisition of the assets of one common carrier by water by another common carrier by water is not the type of agreement which Section 15 either by its literal wording or by its legislative background was intended to encompass; and second, that if the agreement is subject to Section 15, the Commission must hold hearings before approving or disapproving it.

I

It is clear from the language and the legislative history of Section 15 of the Shipping Act, 1916, that the Federal Maritime Commission lacks authority to approve Agreement No. 9903 because it is an acquisition or consolidation of ownership and it is not continuing

in nature. Seatrain's position is that the statutory language does not include consolidations of ownership and clearly limits the FMC's jurisdiction under Section 15 to an ongoing agreement. This Court, quoting the FMC, has noted the plain meaning of the language in Section 15:

> "Section 15 describes in unambiguous language those agreements that must be filed. . . . Since the wording of Section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve." *Volkswagenwerk A.G.* v. *F.M.C.*, 390 U.S. 261, 274, 275 (1968) (quoting from the FMC's decision in *Agreement T-4; Terminal Lease Agreement at Long Beach, Calif.*, 8 F.M.C. 521, 531 (1965)).

Mergers and acquisitions are not enumerated as a type of agreement subject to approval under Section 15, and can not fairly be included by implication. Moreover, even if it were needed here the legislative history shows that it was the intent of Congress when Section 15 was enacted, to limit the FMC's jurisdiction to agreements of an ongoing nature which did not involve consolidations of ownership.

The Commission is empowered to disapprove, cancel or modify any agreement or any modification or cancellation thereof whether or not previously approved by it. But in an agreement for the sale of all the assets of a common carrier by water, there is nothing left for the FMC to modify or cancel once the agreement has been executed and the transfer has taken place. Second, the Commission is given power to disapprove any agreement on a finding of inadequate policing of the obligations under it. Obviously, an agreement which is continuing is the only type which re-

quires policing. Third, Section 15 provides that any agreement shall be lawful "only when and as long as approved by the Commission." Thus, the Commission's approval, unlike the final judgment of a court, is a matter of continuing regulatory supervision.

Even though the statutory language is clear that Section 15 was intended to encompass only ongoing agreements, petitioner has provided an extensive analysis of the legislative history of Section 15 in hopes of supporting its contention that the Commission possesses such jurisdiction. The legislative history, however, demonstrates that Section 15 was intended to remedy problems facing the shipping industry which Congress felt would best be resolved by imposing regulatory jurisdiction over ongoing agreements between carriers by water. By enabling the agency to grant immunity for working agreements which otherwise would have been within the antitrust laws, Section 15 was plainly designed to cover agreements of an ongoing nature. See generally, House Committee on Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade,* H. Doc. No. 805, 63d Cong., 2d Sess. (1914) (cited herein as Alexander Report) at 416.

It must be noted that one "cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry." *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 218 (1966). It is a fundamental principle long recognized by the Supreme Court that antitrust laws represent a basic national economic policy and "repeals of the antitrust laws by implication from a regulatory stat-

ute are strongly disfavored (citing cases), and have only been found in cases of plain repugnancy between antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-51 (1963); *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 315 (1897). Morever, where exemptions have been granted from the antitrust laws, the Court has felt itself "'bound to construe them strictly, since . . . [these exemptions are] restrictive of a free economy." *United States* v. *McKesson & Robbins,* 351 U.S. 305, 316 (1956). See *California* v. *Federal Power Commission,* 369 U.S. 482, 485 (1962). As a result, only the clearest language and clearest intent will support a finding that the Commission has jurisdiction to exempt acquisitions such as Agreement No. 9903 from the antitrust laws. Neither the language nor the intent can be shown to support FMC jurisdiction over the acquisition of one carrier's assets by another under Section 15.

Prior to the passage of the Shipping Act of 1916, Congress undertook an extensive investigation into the steamship industry serving United States commerce. This investigation resulted in a report on the industry which has been previously identified as the Alexander Report. The Alexander Report conclusively shows that the Committee's interest was in agreements, conference arrangements, and gentlemen's understandings of an ongoing nature. (Alexander Report, 13-14). Moreover, the legislative history indicates that the Committee made a distinction between these continuing agreements and other methods of controlling competition between water carriers such as acquisitions or the acquiring of ownership. (Alexander Report, 409). In fact, Section 15 was designed to enable the water car-

riers to agree legally to prevent rate wars or other unfavorable conditions without the need for more complete concentration. (Alexander Report, 416). Thus, when Congress enacted the Shipping Act of 1916 it intended to tolerate only the minimum anticompetitive behavior necessary to preserve an essentially competitive structure in the maritime industry by striving to avoid either the failure or consolidation of independent steamship lines through the method of government supervision of anticompetitive working arrangements. *Isbrandtsen Co., Inc.* v. *United States,* 211 F.2d 51 (D.C. Cir. 1954). The statutory language showing the continuing jurisdiction of the Commission over such agreements shows that only working agreements were encompassed in the legislative grant.

As a general rule, an examination of legislative silence or subsequent legislative action is not a favored way of deriving a reliable view of the legislative intent present when earlier legislation was enacted. *Cleveland* v. *United States,* 329 U.S. 14, 22, 23-24 (1946); *United States* v. *R. J. Reynolds Tobacco Co.,* 325 F. Supp. 656, 662 (D.N.J. 1971). Neither Congressional silence nor later legislative enactments reveal an intent to give merger immunization authority in Section 15 of the Shipping Act, 1916. Moreover, in legislation granting powers to other regulatory agencies such as the Interstate Commerce Commission,[3] the Civil Aeronautics Board,[4] and the Federal Communications Commission,[5] the Congress set forth the merger and

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[3] Interstate Commerce Act §§ 5(2), 5(11), 49 U.S.C. §§ 5(2), 5(11).

[4] Civil Aeronautics Act §§ 408, 414, 49 U.S.C. §§ 1378, 1384.

[5] Federal Communications Act §§ 221, 222, 47 U.S.C. §§ 221, 222.

consolidation authority in clear and specific language. Without a specific legislative grant to the FMC under Section 15, the Commission has no jurisdiction over the acquisition by PFEL of all of Oceanic's assets.

II

The express statutory language of Section 15 requires that the Commission "shall by order, after notice and hearing" disapprove or approve agreements filed with it based upon the interests to be considered which are also set forth in Section 15.[6] Seatrain's position is that the sale of all the assets and operations of one steamship company to another is neither routine nor does it have a *de minimis* impact on commerce, and that the FMC erred in failing to hold hearings on the approvability of Agreement 9903. Even if Seatrain had not filed a timely protest alerting the Commission as to the important questions, antitrust and otherwise, presented by Agreement 9903, the Commission, as part of its statutory duty to determine what is "contrary to the public interest," of its own instigation should have more fully explored the issues presented by Agreement No. 9903. An agency's duty to guard the public interest includes raising issues *sua sponte*. *Marine Space Enclosures* v. *F.M.C., supra,* 420 F.2d at 585.

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[6] To this absolute statutory requirement of holding a hearing prior to Commission action on agreements, there may be an exception for agreements of a "routine" nature or which have a "*de minimis*" impact on commerce. *Volkswagenwerk A. G.* v. *Federal Maritime Commission,* 390 U.S. 261, 276 (1968); *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission and United States,* 420 F.2d 577, 584 (D.C. Cir. 1969).

On its face an agreement for the sale of all the assets of one major American common carrier by water in the foreign commerce of the United States to another such carrier presents questions clearly within the scope of Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended by the Celler-Kefauver Act of 1950. 64 Stat. 1125, 1126 (1950). Had the FMC not claimed jurisdiction over it, Agreement 9903 would have been subject to the standard antitrust tests. In administrative proceedings, private citizens often play a role in the effectuation of antitrust policy, and "the pennant of 'private attorney general' may be hoisted by anyone with an economic stake who desires to signal issues of public interest, [and] may be run to the very pinnacle of the mast in order to alert all concerned to storm signals of anticompetitive restraints." *Marine Space Enclosures* v. *F.M.C., supra,* 420 F. 2d at 591.

After the FMC's order of approval of Agreement No. 9903, Seatrain's Petition to Reopen again raised the warning flag to the Commission that the approval of Agreement No. 9903 was unsupported by substantial evidence and was in violation of the hearing requirement contained in Section 15 of the Shipping Act. (App. 41)

As to the matter of standing, and aside from its rights as a private attorney general, Seatrain was an active competitor with PFEL in the Pacific Coast/Guam domestic trades, and at the time of approval was seriously considering entering into the Far East trades served by Oceanic and PFEL. (App. 35, 36) PFEL had applied to the Maritime Administration for permission under Section 805(a) of the Merchant Marine Act, 1936, to serve Hawaii as part of its subsidized services in the

Pacific foreign trades while Seatrain was an active participant in the trade between Hawaii and the Pacific Coast. (App. 36) Seatrain warned the FMC that the merger of PFEL and Oceanic eliminated both existing and prospective competition between those companies and increased the size and strength of PFEL. *Id.* Although the Commission pointed out in its order that there was nothing which would prevent PFEL and Oceanic from competing with each other anywhere at any future time (P.A. 51, 53), the fact remains that Oceanic was left a mere corporate shell without ships or other facilities for competing with anyone. In *Matson Navigation Co.* v. *F.M.C.*, 405 F.2d 796, 798 (9th Cir. 1968) the court observed that one common carrier by water had standing to protest a merger of other common carriers by water because such activity presented a threat of increased competition. See *Scanwell Laboratories* v. *Federal Aviation Administration*, 424 F.2d 859 (D.C. Cir. 1970). In the instant case it is clear that the FMC had an obligation to hold a hearing on the approvability of Agreement No. 9903, and that Seatrain had standing to be heard in that required hearing.

I. THE FEDERAL MARITIME COMMISSION LACKS JURISDICTION UNDER SECTION 15 OF THE SHIPPING ACT, 1916, TO APPROVE AN AGREEMENT PROVIDING FOR THE ACQUISITION OF ASSETS OF ONE COMMON CARRIER BY WATER BY ANOTHER.

Seatrain's position is that the statutory language of Section 15 of the Shipping Act, its legislative history, and the applicable cases demonstrate that the Commission lacks jurisdiction over an agreement under which one major American common carrier by water purchases all the vessels and operating equipment of another because the Commission's jurisdiction does not include mergers, acquisitions or other agreements of a non-continuing nature. Of the three courts who have passed on the jurisdiction question,[7] two—Judge Garth in *Reynolds* and the D.C. Circuit in *Seatrain*—after extensive analyses of Section 15 and its background, held that the FMC had no merger/acquisition jurisdiction.

By a two-to-one judge majority, the third court apparently felt compelled to find FMC merger jurisdiction because of this Court's statement in *Volkswagenwerk A.G.* v. *F.M.C.*[8] that Section 15 of the Shipping Act, 1916, was to be broadly construed. *Matson Navigation Co.* v. *Federal Maritime Commission*, 405 F.2d 796, 800 (9th Cir. 1968). Seatrain submits that

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[7] (1) *Seatrain Lines, Inc.* v. *F.M.C.*, 460 F.2d 932 (D.C. Cir. 1972)

(2) *Matson Navigation Co.* v. *Federal Maritime Commission*, 405 F.2d 796 (9th Cir. 1968)

(3) *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656 (D.N.J. 1971).

[8] 390 U.S. 261 (1961), a case not involving a merger agreement.

even a broad construction of Section 15 should not bring matters within the statute which are not specifically included in that section or which cannot be fairly implied into the statute from the legislative intent at the time of enactment.

A. The Specific Language of Section 15 Does Not Give the Commission Authority Over Consolidations of Ownership or Agreements Which Are Not Ongoing.

Language for FMC merger or acquisition approval authority is not set forth in Section 15. The statute gives the Commission jurisdiction over agreements:[9]

> fixing or regulating transportation rates or fares;
>
> giving or receiving special rates, accommodations or other special privileges or advantages;
>
> controlling, regulation, preventing, or destroying competition;
>
> pooling or apportioning earnings, losses, or traffic;
>
> allotting ports or restricting or otherwise regulating the number and character of sailings between ports;
>
> limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or
>
> in any manner providing for an exclusive preferential, or cooperative working arrangement.

No language in Section 15 gives the FMC jurisdiction over consolidations of ownership, and each agreement listed is a type of business arrangement made

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[9] In Section 15 "agreement includes understanding, conferences, and other arrangements."

by a carrier to maintain normal operations in a trade. A merger or an acquisition of all the assets of one common carrier by water by another is neither routine nor is it made in the normal course of business. The types of Section 15 agreement enumerated assume the continuous independent existence of the participants, and are directed to viable and separate parties. The final clause is *ejusdem generis* and encompasses all the types of agreements mentioned in each of the other clauses. It sets forth the general area of regulation in expansive language and serves to support the position that agreements within Section 15 must be of an ongoing or "working" nature.

Other paragraphs of Section 15 further the view that continuing agreements are the only category brought within the statute. The second paragraph of Section 15 empowers the FMC to "disapprove, cancel or modify any agreement . . . whether or not previously approved by it" if contrary to the purpose of the Act. This clearly refers to ongoing agreements. The third paragraph of the section enables the Commission to disapprove an agreement if it finds "inadequate policing" of the obligations thereunder. Only continuing agreements require "policing" and there is nothing for the FMC to regulate once a merger or acquisition has been completed.[10]

Lastly, the fourth paragraph of Section 15 provides that "agreements . . . shall be lawful only when *and as long as* approved by the Commission." (Emphasis added) The statute contemplates continuing agreements over which the FMC can utilize its regulatory

[10] Unlike the FCC, CAB and ICC, the FMC has no divestiture powers under Section 11 of the Clayton Act, 15 U.S.C. § 21.

expertise to assure that carrier activity coincides with the intent of the Act. Since as noted in footnote 10, *supra*, the FMC is without divestiture authority, a merger or acquisition once completed is beyond the reach of the Commission, regardless of the regulatory interests touched thereby. Section 15 does not by its terms apply to mergers or acquisitions.

B. The Legislative History of Section 15 Shows That Congress Did Not Intend to Give the FMC Jurisdiction Over Mergers or Over Non-Continuing Agreements.

Recognizing the clarity of Section 15, this Court quoted the Commission in *Volkswagenwerk A. G.* v. *Federal Maritime Commission*, 390 U.S. 261 (1968):

> Section 15 describes in unambiguous language those agreements that must be filed. . . . Since the wording of Section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve. (390 U.S. at 274, 275.)

Although the plain statutory language requires no resort to the legislative history of Section 15 to show that the FMC has no merger authority, petitioner contends the background of the section supports a finding of jurisdiction. (Petitioner's Brief, 8). On the contrary, an analysis of the history of Section 15 shows that the section was designed to prevent wholesale mergers and massive concentrations of ownership through the device of allowing anticompetitive but ongoing agreements between persons in the steamship industry. (Alexander Report, 416).

Prior to the enactment of the Shipping Act, Congress authorized the House Committee on Merchant Marine and Fisheries to conduct an "exhaustive inquiry into the practices of shipping conferences." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481,

488 (1958). The product of the Committee's toil was the Alexander Report which was the source of the Congressional policy embodied in the Shipping Act. (Alexander Report, 419-20.) Of the eighty agreements in the foreign trades examined by the Committee, not one was a merger or other form of corporate reorganization. *Id.* 218-295. The Alexander Report summarized its findings as follows:

> The facts contained in the foregoing report show that it is almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and out-bound voyages, under the terms of written *agreements, conference arrangements, or gentlemen's understandings,* which have for their principal purpose the regulation of competition through either (1) the fixing or regulating of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines. Eighty such agreements or understandings, involving practically all the regular steamship lines operating on nearly every American foreign trade route, are described in the foregoing report . . . . The report also presents the economic advantages and disadvantages of steamship agreements and conference arrangements as presented to the Committee by steamship line representatives and the exporting and importing interests of the United States. . . . (Alexander Report, 415.) [Emphasis added.]

The agreements examined by the Alexander Committee described practices in which two or more shipping companies agreed to participate over a considerable period of time. But none resembled a merger "which is essentially a single, discrete event, [and]

which transforms the relationship of the merging parties at the instant of merger." *United States* v. *R. J. Reynolds Tobacco Company, supra,* 325 F. Supp. at 659.

According to the *Reynolds* court, the Alexander Report, when referring to "consolidation by ownership" and "control through acquisition" never used the word "agreement" to refer to a merger agreement. *U.S.* v. *R. J. Reynolds Tobacco Co., supra,* at 659. Moreover, the Committee made a distinction between consolidation agreements and other types of agreements as shown by this comment which happens to be on the domestic trade:

> The numerous methods of controlling competition between water carriers in the domestic trade, referred to on preceding pages, may be grouped under three headings, viz, (1) control through *acquisition* of water lines or the *ownership* of accessories to the lines; (2) control through agreements or understandings; and (3) control through special practices. (Alexander Report, 409.) [Emphasis as in original].

Thus, Section 15 was enacted to regulate a limited type of ongoing agreement by preventing abuses while allowing proper utilization of such agreements. The Committee reported that:

> Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership . . . [E]ither would

> mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. (Alexander Report, 416.)

The Committee felt that mergers, which by their nature cause the disappearance of individual carriers and reduce competition, were undesirable. *Id.* 301, 416-18; *United States* v. *R. J. Reynolds Tobacco Co., supra*, 325 F. Supp. at 660. The Committee was also of the opinion that it would be beneficial to shippers to have cooperative working agreements filed with the government and available for public inspection since these agreements had customarily been kept secret. (Alexander Report, 307, 311-313, 416.) Unlike mergers, cooperative working agreements do not permanently eliminate all competition between the parties and are subject to modification or disapproval by the Commission.

The Committee originally selected and recommended the Interstate Commerce Commission as the agency to receive the authority to regulate maritime agreements. This selection supports the conclusion that antitrust immunity for consolidations of ownership was not intended to be conferred on the FMC by the Shipping Act, 1916. (Alexander Report, 419, 420). In 1915, the ICC did not have full acquisition jurisdiction; in fact it was not until 1940 that the Interstate Commerce Act was amended to include consolidation and merger. 54 Stat. 899, 905 (1940). Actually, the ICC did not even acquire limited antitrust immunity authority until 1920. 41 Stat. 456, 481, 482 (1920). Thus, as the Committee envisioned it, the ICC, which was without acquisition or other antitrust authority, was originally intended to regulate maritime commerce. It does not make sense to assume that the committee intended to give the ICC extensive antitrust immunity powers over

mergers while other areas of ICC jurisdiction, e.g. railroads, could not be given antitrust exemptions. One must conclude that the original proposal to give the ICC jurisdiction was because Section 15 was never intended to give authority for antitrust immunity for mergers or for non-continuing agreements.

C. The Principles of Statutory Construction and the Consolidation Authority of Other Federal Administrative Agencies Show That Section 15 Does Not Give the Commission Jurisdiction Over Consolidations of Ownership.

The principles of statutory construction and an examination of the language enabling other federal administrative agencies to grant antitrust immunity for agreements of merger, consolidation, and acquisition further demonstrates that Section 15 of the Shipping Act does not grant the FMC such authority.

1. Statutory Construction

"[T]he antitrust laws represent a fundamental national economic policy" [11] and "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." [12] Exemptions from the antitrust laws are strictly construed [13] since they are restrictive of a free economy, and this Court "cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to

[11] *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213, 218 (1966).

[12] *United States* v. *Philadelphia Natl. Bank*, 374 U.S. 321, 350-351 (1963).

[13] *United States* v. *McKesson & Robbins*, 351 U.S. 305, 316 (1956).

render the more general provisions of the antitrust laws wholly inapplicable to that industry." *Carnation Co.* v. *Pacific Westbound Conf., supra,* at 216; *Hecht* v. *Pro-Football, Inc.,* 444 F.2d 931, 935 (D.C. Cir. 1971), *cert.* denied, 404 U.S. 1047 (1972).

Section 15 sets forth the full extent of the agreements to which the Commission may grant antitrust immunity and "[i]f Congress had desired to grant any further immunity [it] would doubtless have said so." *United States* v. *Borden Co.,* 308 U.S. 188, 201 (1939). The silence of Congress in Section 15 as to consolidations of ownership or mergers must mean that there was no intent to include such agreements for consideration under the Shipping Act of 1916.[14] Petitioner's strained effort to imply from silence that Congress had a contrary intent is not a favored method of statutory interpretation. *Cleveland* v. *United States,* 329 U.S. 14, 22, 23-24 (Rutledge, J., concurring opinion) (1946); *United States* v. *R. J. Reynolds Tobacco Co., supra* at 662.

Petitioner's attempt to read merger authority into Section 15 by examining legislation enacted long after that section became law or by demonstrating the Commission's own actions or views as to its merger au-

[14] A 1917 analysis of the Shipping Act of 1916 described Section 15 as regulating "pooling, rate and other cooperative agreements. . . ." *Current Legislation, Government Regulation of Private Shipping,* 17 COLUM. L. REV. 357, 358 (1917). A recent note concludes that merger jurisdiction is not vested in the FMC by Section 15 of the Shipping Act, but points out that certain public policy considerations would be ignored by a strict construction of the statute. Note, *The Shipping Industry Needs a Safe Haven: Merger Jurisdiction for the FMC?* 5 LAW AND POLICY IN INTERNATIONAL BUSINESS, 274 (1973). Seatrain submits that public policy decisions are the responsibility of Congress, and that body has not decided to give the FMC acquisition jurisdiction.

thority is completely unfounded. The 1950 amendment to Section 7 of the Clayton Act, which extended that Act's coverage to include the acquisition of assets, exempted from the Act transactions taking place under *existing* agency antitrust immunity authority, but conferred no greater authority to the agencies concerned. 64 Stat. 1125 (1950). Although the FMC's predecessor was one of the agencies mentioned in that 1950 amendment, its inclusion is not inconsistent with the FMC's jurisdiction over continuing agreements. Moreover, this Court has held that the amendment was "plainly not a grant of power to adjudicate antitrust issues" because it was not intended to be the source of any new authority. *California* v. *F.P.C.*, 369 U.S. 482, 486 (1962). *See* S. Rep. No. 1775, 81st Cong., 2d Sess., 7.

Although an administrative agency's interpretation of its establishing legislation is entitled to deference in the courts, "the courts are the final authorities on issues of statutory construction" and " 'are not obligated to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " *Volkswagenwerk A. G.* v. *F.M.C.*, 390 U.S. 261, 272 (1968); cf. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 499-500 (1958) (overturning FMC predecessor agency's construction of Section 14 of the Shipping Act). Petitioner, by erroneous interpretation of its enabling statute, cannot bootstrap its way into jurisdiction over mergers or other consolidations of ownership.[18]

[18] The acquisitions cited by petitioner which received FMC approval, all involved some ongoing agreement. But we do not concede that the FMC has jurisdiction over any type of acquisition of ownership.

2. The Consolidation Authority of Other Federal Agencies

The fact that Congress was specific when it granted other federal administrative agencies the power to immunize mergers confirms the view that no such authority was intended to be granted in Section 15 of the Shipping Act of 1916. The Civil Aeronautics Act gives the Civil Aeronautics Board clear authority over consolidation, merger and acquisition of control in Section 408 (49 U.S.C. § 1378). We invite the Court's attention to Section 412 (49 U.S.C. § 1382), which requires filing for CAB approval of agreements:

> between such air carrier and any other air carrier . . . for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges or classifications . . . or for *controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.* [Emphasis added]

The similarity between Section 412 above and Section 15 of the Shipping Act is striking, but Section 412 does not give the CAB merger authority. The CAB gets its consolidation of ownership authority from Section 408. There is no authority granted to the FMC similar to Section 408; the FMC's Section 15 authority is merely similar to that of the CAB under Section 412.

The Interstate Commerce Act, Section 5(2), authorizes the ICC to give approval for "two or more carriers to consolidate or merge. . . ." 49 U.S.C. § 5(2)(a)(i). Similarly, the Federal Communications Act provides that it shall be lawful, subject to Federal

Communications Commission approval, for "any two or more domestic telegraph carriers to effect consolidation or merger." 47 U.S.C. § 222(b). The care and specificity used in these statutes empowering agencies to approve mergers demonstrates that Congress knew how to use plain and definitive language to describe the authority granted. Section 15 cannot be found to include authority to approve Agreement 9903 based on its actual language, any implication drawn therefrom, its legislative history, or the subsequent actions of Congress or the Commission.

II. THE COMMISSION ERRED IN FAILING TO HOLD A HEARING PRIOR TO APPROVING AGREEMENT NO. 9903, AND IT ERRED IN DENYING STANDING TO SEATRAIN, A COMPETITOR WITH PFEL IN THE DOMESTIC TRADES AND A POTENTIAL COMPETITOR OF BOTH PFEL AND OCEANIC IN THE FOREIGN TRADES.

Whether or not the Court finds FMC merger jurisdiction, we urge that the issue which sparked this litigation be resolved. That issue concerns the right of Seatrain or any other interested party to intervene and to be heard prior to FMC action on an agreement filed under Section 15 which may have an effect on the interested party's present or future competitive position. The FMC's failure to grant hearings in this and other cases has generated much litigation. *Marine Space Enclosures, Inc.* v. *FMC, supra.* Section 15 of the Shipping Act, 1916, requires that the FMC hold a hearing prior to ordering approval of an agreement.[16] The FMC should have granted Seatrain standing to protest

[16] There may be an exception to this rule for agreements of a routine nature or which have a *de minimis* impact on commerce. *Volkswagenwerk A. G.* v. *FMC, supra,* 390 U.S. at 276, *Marine Space Enclosures* v. *FMC,* supra, 420 F.2d at 584, n.14.

Agreement No. 9903 because of its position as a competitor with PFEL in the domestic trade and as a potential competitor of both PFEL and Oceanic in the Far East trade. (App. 35, 36, 41)

A. The Commission Erred in Failing to Hold a Hearing Before Approving Agreement No. 9903.

Section 15 of the Shipping Act, 1916, requires that the Commission

> shall by order, *after notice and hearing,* disapprove, cancel or modify any agreement . . . whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers . . . or to operate to the detriment of the commerce of the United States or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements. . . . [Emphasis added]

The absolute requirement of the statutory language for hearing prior to Commission action under Section 15 has been interpreted by this Court to mean nothing less than to "subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry."[17] *Volkswagenwerk A. G.* v. *FMC, supra* at 276. The Court noted, however, that:

> This is not to say that the Commission is without power to determine after appropriate administrative proceedings, that some types or classes of agreements coming within the literal provisions of § 15 are of such a *de minimis* or routine character as not to require formal filing. *Id., Marine Space*

[17] Except those non-continuing consolidation agreements which are not within Section 15 as shown in this brief, *supra.* pp. 14-25.

Enclosures, Inc. v. *FMC,* 420 F.2d 577, 584 n.14. (D.C. Cir. 1969).[18]

The acquisition of all of Oceanic's assets by PFEL, however, is plainly a matter which is neither routine nor of a *de minimis* impact. Even if Seatrain had not filed its timely protest, the FMC's statutory duty under Section 15 to determine whether Agreement 9903 was discriminatory or unfair, operated to the detriment of the commerce of the United States, was contrary to the public interest, or was in violation of the Act, should have resulted in a reasonable analysis of the agreement instead of the comment that:

> Here, however, the nature of the agreement as indicated by its language does not indicate a need for further justification, and nothing has been raised by Seatrain which indicates that it is required. (Commission's Denial of Petition to Reopen, December 8, 1970, P.A. 56)

The FMC's refusal to look beyond the face of Agreement 9903 is contrary to the agency's duty to take necessary action under the statute in weighing antitrust considerations to protect the public interest.[19] As the Court of Appeals noted in *Marine Space Enclosures* v. *FMC, supra:*

> Section 15 requires an affirmative act of approval. The significance of this is undeniable. On the one hand, it is unlawful to act in pursuance of the

[18] Subseqently, Congress amended the Shipping Act by adding § 833(a) to Title 46 of the United States Code which empowers the FMC to exempt certain unspecified classes of agreements from filing requirements as long as the class of agreements are found not to contravene the Commission's statutory obligations. Considering the importance of the antitrust laws, it is unlikely that the Commission would find acquisition agreements appropriate for exemption and no such exemption is involved here.

[19] cf. *F.M.C.* v. *Svenska Amerika Linien,* 390 U.S. 238 (1968).

> agreement prior to receipt of approval. On the other hand, the Commission's imprimatur, when received, carries with it immunity from the antitrust laws. It would be travesty to suppose that Congress meticulously required an appropriate hearing and reasoned disposition as a condition of disapproval of industry agreements but was prepared to acquiesce in agency approval on the basis of back-office and one-sided conversation, and unpublished disposition unaccompanied by reasoned analysis and opportunity for appropriate presentation of objection, evidence and argument. What the words of § 15 fairly indicate is that an appropriate hearing shall be held prior to either approval or disapproval. 420 F.2d at 583-584. [Footnotes omitted.]

For the FMC to order an approval or a disapproval under Section 15, the Commission is bound to hold a hearing to subject the filed agreement to a searching examination, particularly where the Commission has been alerted to the potential issues and antitrust considerations by a timely protest and request for hearing. Even where there is no filed protest, the FMC has an obligation to consider the implications of the agreement on its own motion under its statutory duty to ensure that approval contravenes no policy of the Shipping Act. For example:

> Antitrust questions in general, and in particular contracts involving such all-encompassing restraints, present issues of the kind that should be explored *sua sponte* in order to discharge an agency's active and independent duty to guard the public interest, "and if need be, the Commission should order a hearing to ascertain whether there exists alternative courses other than those suggested by the applicant." (Footnote omitted) *Marine Space Enclosures, Inc.* v. *FMC, supra,* 420 F.2d at 585.

Likewise, the Commission has recognized that the consideration of agreements is not limited to the bare bones of the arrangements presented for approval to which it limited itself in Agreement 9903. In *Agreement No. T-4; Terminal Lease Agreement at Long Beach, California,* 8 F.M.C. 521, 529 (1965), the FMC set forth its views as to the scope of examination in Section 15 cases:

> In discharging our duties under section 15, we are not limited to those matters parties to agreements wish us to see. *We are required to go further. Where agreements are strongly protested, as here, we must examine not only the terms of an agreement, but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objectives and results of the agreements.* Section 15 is concerned with competitive relationships and the limited lessening of competition in the furtherance of our maritime transportation policy. Thus, to determine if an agreement falls within the requirements of section 15, we must consider in the interests of uniform, enlightened regulation to what extent the agreements affect competition. To decide otherwise is merely to remand the clever draftsman at the expense of our regulatory responsibility. (8 F.M.C. at 529.) [Emphasis added]

Under Section 15, the FMC's duty to hold a hearing prior to approval of an agreement is even stronger where, as here, (1) a protest and request for hearing is filed and, (2) the agreement itself absent section 15 approval clearly would be subject to attack under the antitrust laws.[20] But in disregard of its own rules

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[20] Section 7 of the Clayton Act, as amended, provides, *inter alia,* that "no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capi-

and the judicial admonitions, the Commission failed to hold a hearing for Agreement 9903.

The Congressional mandate of Section 15 is to permit the invasion of the national antitrust policy only to the extent absolutely necessary. Thus:

> [T]he Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the antitrust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute. *Isbrandtsen Co., Inc.* v. *United States*, 211 F.2d 51, 57 (D.C. Cir. 1954), *cert. de-*

tal and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18, 38 Stat. 730 (1914), 64 Stat. 1125 (1950). PFEL's acquisition of all of Oceanic's operating assets is on its face within the statute, but without an evidentiary record the market definition for a showing of substantial lessening of competition in violation of the Clayton Act is difficult to assess. Competition between the company acquired and the company acquiring is not a requirement, because the purchase may enhance the strength of the acquiring company to a position of undue advantage resulting in a substantial lessening of competition. *U.S.* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966); *U.S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958). The foreclosure of prospective competition between merging companies is sufficient for a violation. *Proctor & Gamble Co. (Clorox)* v. *F.T.C.*, 386 U.S. 568 (1961); *U.S.* v. *Philadelphia Natl. Bank*, 374 U.S. 321, 362 (1963). The PFEL purchase of Oceanic's assets certainly foreclosed competition between the two and may have given PFEL an undue advantage as well. The FMC's cursory handling of Agreement 9903 does not make possible any meaningful analysis of the scope of the antitrust questions raised by Seatrain.

nied sub nom.; Japan-Atlantic Gulf Conf. v. *United States,* 347 U.S. 990 (1954).

Because it failed to hold a hearing on Agreement 9903 and since it admittedly relies solely on the language in that Agreement [21] as a basis for approval, the Commission could not ascertain the extent of the intrusion into the antitrust laws presented by the sale and thus was in disregard of its duties under the statute and as interpreted by the courts. Before an agency may override antitrust principles, "the proper antitrust questions must be asked and answered." [22] In approving Agreement 9903, the Commission erroneously denied a proper party the right to a hearing, and it did not bother to ask any questions. We urge the Court to hold that the FMC's failure to hold a hearing after receiving a protest from a proper party was error.

B. The Commission Erred in Denying Standing to Seatrain, a Competitor with PFEL in the Domestic Trades and a Potential Competitor of Both PFEL and Oceanic in the Foreign Trades.

One of the bases for the Commission's refusal to hold a hearing prior to approving Agreement 9903 was its finding that Seatrain lacked standing. Order Approving Agreement No. 9903 (P.A. 53). The notice appearing in the October 14, 1970 issue of the "Federal Register" (35 Fed. Reg. 16114) for Agreement No. 9903, however, merely asked for a "clear and concise statement of the matters upon which [interested parties] desire to advance evidence" and that the acts or circumstances alleged to constitute a violation of the

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[21] Denial of Petition to Reopen (P.A. 56)

[22] *National Air Carrier Assoc. et al.* v. *C.A.B.,* 436 F.2d 185, 194 (D.C. Cir. 1970).

Act or a detriment to commerce be stated with particularity. Seatrain's timely protest which pointed out the prejudice to itself and other prospective entrants into the trade, the elimination of potential competition between PFEL and Oceanic, the Clayton Act problem, and Seatrain's fear that Oceanic's two vessels under construction with federal subsidy would be used by PFEL in competition with Seatrain in the trade between Guam and Hawaii and the Pacific Coast, satisfied this requirement (App. 35). Seatrain's subsequent petition seeking reopening further amplified and clarified its interest, *inter alia,* in preventing unfair competition to its domestic service, in intervening as a prospective competitor in the foreign trades, and by delineating the factual issues which supported its request for a full evidentiary hearing. (App. 41, 45, 47). The Commission in its order of approval noted that "there must be sufficient information brought to . . . [the FMC's] . . . attention to activate the hearing requirements." (P.A. 52). Even though Seatrain provided enough data to trigger a hearing under this standard, this Commission requirement places a burden on a protestant which is not justified by the cases and which is in direct conflict with the provision in Section 15 that the FMC act only "after notice and hearing." Contrary to that agency's stated view, it is the Commission's burden to justify the denial of Seatrain's right to a hearing:

> [W]e have under consideration an administrative action that is mandated for hearing by § 15 of the Shipping Act. The burden is not on the person who wants an unusual hearing (as in the case of rule-making or waiver) but on the agency desiring the unusual dispensation from hearing. *Marine Space Enclosures, Inc.* v. *FMC, supra,* at 586-7, n. 26.

As noted, Seatrain was a competitor of PFEL in the Pacific Coast/Guam trade and would have been directly affected by approval of Agreement 9903. The fact that Seatrain was only a prospective competitor with PFEL and Oceanic in other trades is not a reason for denying Seatrain standing.[23] *Scanwell Laboratories,* v. *Federal Aviation Administration,* 424 F.2d 859 (D.C. Cir. 1970); *Sea-Land Service, Inc.* v. *Connor,* 418 F.2d 1142 (D.C. Cir. 1969). The Court of Appeals for the District of Columbia Circuit discussed a potential competitor's standing to object to administrative action in *Marine Space Enclosures, Inc., supra,* stating:

> Petitioner's standing as a competitor, however, is established not only by its interest as a potential competitor, but by the nexus between that interest and the substantive objection that an order approving the agreements would not be in the public interest because of the way it operates to foreclose competition. Even a potential competitor has standing to present non-frivolous claims of undue restraint on future competition.
>
> The pennant of "private attorney general," may be hoisted by anyone with an economic stake who desires to signal issues of public interest, may be run to the very pinnacle of the mast in order to alert all concerned to storm signals of anticompetitive restraints. *Marine Space Enclosures, Inc.* v. *F.M.C., supra,* at 598-99.

And in *Matson Navigation Co.* v. *FMC, supra,* the court discussed the standing of a protestant who would suffer increased competition by approval of an agreement:

> The Commission found that Matson would suffer no injury as a result of the merger but would face greater competition. This is sufficient to give

standing. *F.C.C.* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239 (1943); *Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4 (1942); *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940). Further, if the Commission has power under § 15 to approve the agreement, the result would be to immunize the merger from the provisions of the antitrust laws, and Matson could never attack it in the future should injury later result. *Sunshine Coal Company* v. *Adkins*, 310 U.S. 381, 401-04 (1940).

We conclude that Matson has standing to seek review. 405 F.2d at 798.

Seatrain, as an actual and a potential competitor and having a clear interest in Agreement 9903, had standing to protest the agreement and was entitled as a matter of right to a hearing thereon. The Commission erred in denying Seatrain the hearing it requested and we ask the Court to so find.

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[28] *See* note 2 *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below be affirmed. ~~Whether or not~~ this Court finds FMC jurisdiction over Agreement 9903, it is respectfully requested that the Court remand this case with instructions to the Commission to hold a hearing on the agreement and to grant Seatrain Lines, Inc. standing to appear at such hearing.

Respectfully submitted,

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ADDENDUM

Section 15 of the Shipping Act, 1916
46 U.S.C. § 814

§ 814. Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc. by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption.

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifica-

tions, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations pertaining thereto (including changes in special rates, fares, and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval

upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1—11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action. *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section. (Sept. 7, 1916, ch. 451, § 15, 39 Stat. 733; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, ch. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; Oct. 3, 1961, Pub. L. 87—346, § 2, 75 Stat. 763; Feb. 29, 1964, Pub. L. 88—275, 78 Stat. 148.)